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Supreme Court of the United States.

OCTOBER TERM, 1960

No. 593

JAMES E. McDANIEL,

Petitioner,

against

M S LISHOLT, her engines, etc, and A. S. LISE, her owner,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1960

No.

JAMES E. McDANIEL,

Petitioner,

against

M S LISHOLT, her engines, etc. and A. S. LISE, her owner;

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, James E. McDaniel, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above cause on September 22, 1960.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (Ryan, C. J.) reported 1959, 180 F. Supp. 24, is set forth at pages 43a-51a of the appendix to the petitioner's brief filed in the Court of Appeals.

The opinion of the United States Court of Appeals, 2 Cir., 282 F. 2d 816, is included in the appendix to this petition.

This case was previously before this Court, 359 U. S. 26, 79 S. Ct. 602, 3 L. Ed. 2d 625, and was remanded for a new trial "in light of *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625".

The opinions preceding remand are reported, S. D. N. Y. 1957, 155 F. Supp. 619; 2 Cir. 1958, 257 F. 2d 538.

Jurisdiction

The jurisdiction of this Court is based upon the provisions of 28 U. S. C. 1254 (1).

Jurisdiction in the District Court was based upon Admiralty 28 U. S. C. 1333.

Questions Presented

1. Should this Court, in the exercise of its admiralty jurisdiction, import into the general maritime law the common law rule that an occupier who negligently sets fire to his premises owes no duty to a professional fireman who is injured as a result of the fire?

2. Assuming that the general maritime law perpetuates the common law rule, does petitioner herein come within one of the recognized exceptions which permits recovery where the occupier has violated a safety statute, ordinance or governmental regulation?

3. Did the Courts below err in failing to apply the standard of reasonable care required by *Kermarec* v. *Compagnie Generale Transatlantique*, *supra*? The Court of Appeals adopted the District Court's finding that respondent's duty to take affirmative action with respect to the gas fumes in the chill box did not arise until some time after 4:30 P. M. Was this finding "clearly erroneous"?

4. (a) Was the M S Lisholt a "dead ship" at the time of petitioner's injury?

(b) Was the petitioner, as a fire watchman, engaged in work "traditionally done by seamen" at the time of his injury?

(c) Does the doctrine of unseaworthiness extend to a professional fireman who boards a fire-wracked vessel as a fire watchman and is thereafter injured as a consequence of the fire caused by the unseaworthiness of the vessel?

Statement of Case

On Feb. 6, 1954, shortly after 5:30 P. M. an explosion occurred aboard the M S Lisholt (45a)[1] as she lay moored at the Balboa Docks, Panama, Canal Zone (Finding 14, 60a). The explosion killed a chemist employed by the Canal Zone Government, and four longshoremen. It also injured several other longshoremen and caused the petitioner to be severely burned (Finding 24, 63a).

Petitioner, a fireman employed by the Canal Zone Fire Department, was on board the vessel as a fire watchman (Finding 17, 61a) because of a fire which had broken out on the vessel earlier that day at about 12:45 A. M. (Finding 3, 10a) and which was considered extinguished at about 8:00 A. M. (Finding 7, 57a).

A. The Conceded Negligence of the Respondent In Causing the Fire.

Feb. 6, 1954—12:20-12:45 A. M.: The M S Lisholt was tied up at Dock 6 and light diesel oil was being pumped from full tanks ashore through hoses into one of the ves-

[1] Numbers are to pages of Transcript of Proceedings, pp. 1-298. Numbers followed by "a" refer to Appendix to Appellant's Brief, pp. 1a-53a, and Appendix to Respondent's Brief, pp. 54a-80a in the Court of Appeals.

sel's double bottom fuel tanks (Finding 3, 10a). The Third Engineer and a motorman were on duty in the engine room (Finding 4, 10a). The motorman was to take soundings of the tank as it was being filled, through a sounding tube, and was to notify the officer when it had reached a designated level, so that the fueling could be transferred to another tank (24, 26, 210). The top of the sounding tube was equipped with a spring activated safety valve which was designed to close automatically when not held in an open position. This was to prevent the fuel from overflowing into the engine room (24, 27, 86-87, 97). This valve could not close automatically because it had been lashed to remain in an open position (24-25, 27-28). While the fueling was in operation, a sparking electrical motor was in operation adjacent to the open sounding tube (30, 91, 92, 94-96). The testimony was uncontradicted and respondent's own "remarkably well qualified"[2] expert admitted that the combination of a sounding tube with a valve lashed open, adjacent to a sparking motor was "not good practice, because [of] the chances of oil vapors getting to the source of ignition" (199).

At 12:45 A. M. the diesel oil overflowed out of the sounding tube and ignited (Finding 3, 10a).

When the fire broke out there was no suitable fire-fighting apparatus ready for immediate use. The vessel had no fire-fighting system independent or outside of the engine room (Finding 6, 11a). The fire hose in the engine room was unconnected (32). The vessel had a CO2 fire extinguishing system for the cargo holds, but not for the engine room (Finding 6, 11a). It was not equipped with fog nozzles to put out or contain an oil fire (32). There had been only one or two fire drills in the past six months (33, 34).

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[2] 45a (Opinion of Ryan, C. J.).

The testimony is uncontradicted and respondent's expert, Chief Burke, testified that these omissions violated recognized and customary safeguards for containing shipboard fires once they broke out (197-198, 195-197). The Chief Officer testified that had the fire occurred at sea, the vessel would have been lost (32-33).

Although respondent refused to stipulate the foregoing facts, it nevertheless "admitted that it was jointly at fault with the Panama Canal Company in starting the fire" (Finding 3, 10a).

B. The Subsequent Events Leading to the Explosion.

8:00 A. M. Fire was considered extinguished (Finding 7, 57a).

8:00 A. M.-9:30 A. M.: Survey of the ship and compartments surrounding the fire was made by the Fire Department and "everything was found quiet" (Finding 8, 57a). No inspection was made of the freeze box (Finding 8, 57a, 208, 209).

9:30 A. M.: Firemen leave the vessel. Two firemen left as fire watchmen (Finding 7, 57a).

Between 9:00 A. M.-10:00 A. M.: Chief Steward and Chief Cook entered the chill box for the purpose of checking on the condition of the stores. (The refrigerator area consisted of a chill box and within it a freeze box.) They noticed the adhesive over the cork insulation running down the outside of the chill box door. They smelled "gas or smoke or something" (Finding 9, 11a, 34, 35). When they opened the freeze box door which was completely insulated and "dogged down tight" (38), they got "a kind of smoke or gas right against us, so we had to move back. We couldn't push through in the beginning" (35). They then obtained a stronger flashlight and returned to the freeze box. Although they found the meat frozen and ice still on

the pipes (Finding 10, 58a), they had to force their way in "through the smoke or gas" (35). Though the "Steward was not sure of the identity of the smoke or gas" (Finding 9, 11a), no danger was suspected because he "knew that the refrigerant was harmless freon gas." (*Ibid.*) There was so much smoke all over, "We weren't thinking about gas, any of us * * *" (214). The Master confirmed that the Steward had reported to him "there was smoke or something that the Steward did not know in the chill or freeze boxes" (Finding 10, 58a-59a).

Prior to 11:00 A. M.: The Master, following conferences with his Chief Officer, Chief Steward and Hignett, representative of the ship's general agent, ordered that the refrigerated stores be removed from the vessel as soon as it was "safe" to do so (Finding 10, 59a). Hignett arranged with Kinsman, assistant superintendent, Terminals Division, Panama Canal Company, to supply the necessary stevedores to remove the stores (Finding 12, 59a).

11:30 A. M.: Kinsman and Garay, a stevedore subforeman, opened the chill box door to see the condition of the refrigerated food. Kinsman, standing outside the door, and Garay, inside, both detected a "slight refrigerant odor" (Finding 12, 59a, 220). Kinsman was sufficiently concerned about the gas odor and the safety of his men working in the chill box that he thought it necessary to obtain an opinion from a group of men standing on the dock. Hignett was present at the conference (Finding 12, 60a, 217). But, instead of simply reporting the presence of gas, Kinsman only inquired whether freon gas was dangerous. The answer, of course, was "no" (Finding 12, 59a, 220-221). Kinsman did not report to the Fire Department as he should have for their expert opinion (182). Neither did Hignett. Nor did Hignett report the gas odor to the Chief Engineer aboard the vessel who was responsible for and familiar with the operation of the refrigeration system. In fact, neither the Chief Engineer nor any other ship's

officer inspected either the chill box or freeze box during the 10 hour period between the fire and the explosion (Finding 11, 59a).

2:00 P. M.: The vessel was towed from Dock 6 to Dock 14 of the Balboa Docks (Finding 14, 60a).

2:30 P. M.: Garay returned to the chill room and entered the freeze box. He reported to Kinsman that the meat was still hard (Finding 15, 60a). Garay also testified that on this occasion he found gas (23a) and again about 3:30 P. M. when he returned to the freeze box with the Chief Cook (24a). Although Judge Ryan rejected this testimony (49a), stipulated findings 12 and 15 (59a-60a) establish Garay's presence in the chill box on at least two occasions.

3:00 P. M.: Discharging of the stores from the chill box commenced (Finding 15, 60a).

3:00-5:00 P. M.: The Chief Steward supervised the removal. He was in the chill box area from 3:00 P. M. to approximately 5:00 P. M. The Chief Cook was also in the area until shortly before the explosion (Finding 16, 60a-61a). Throughout this entire period, the freeze box door remained closed and dogged. (*Ibid.*) During this period, the Chief Steward admitted that he and the Canal Company employees "were talking about smelling gas in the store room, but we didn't talk about gas inside the freezer" (38-39).

4:00 P. M.: Petitioner boarded the vessel as a fire watchman (Finding 17, 61a). The fireman he relieved reported to him that all was quiet (Finding 17, 61a).

4:30 P. M.—5:30 P. M.: Two stevedore foremen, Cole and Freeman, came on board to prepare for the night shift (62a, 32a). Cole opened the freeze box and found gas (32a-33a). Freeman did not enter the freeze box because of the "awful odor of gas in there" (Finding 21, 62a).

Cole told Hignett that "he was not too happy about the condition of the freeze box". Hignett, for the first time, asked if a chemist had been sent for and whether blowers had been set up to dissipate the gas fumes. Cole replied that lines had been laid for blowers but they were not yet installed in the room (Finding 20, 62a).

Approximately 5:30 P. M. to Explosion: Freeman went up on deck and informed petitioner that the men would not work in the freeze box because of the presence of gas (Finding 22, 62a). Petitioner proceeded to the refrigerated space area and he and Cole opened and entered the freeze box (Finding 22, 62a). Petitioner smelled "potent" gas (151) which he believed to be ammonia and highly explosive (Finding 23, 63a). He went up on deck to report the gas to the Fire Department (Finding 23, 63a). On deck petitioner met Freeman and Fedde, a chemist, who was there fortuitously to check oil, and had never been summoned to analyze the gas odor (223, 224-225, 16a). Petitioner accompanied Fette back to the freeze box for a further investigation. Petitioner found the gas odor stronger and suggested they leave. Just as he finished latching the door to the freeze box the explosion occurred (Finding 24, 63a).

Subsequently, it was found that the heat from the original fire had radiated through the steel plates causing the cork insulation in the freeze box to smolder (Finding No. 35, 65a). The incomplete combustion of the insulation created an explosive atmosphere consisting of carbon monoxide and other unknown gases (Finding No. 33, 64a). It was these gases which exploded (Finding 36, 37, 65a).

Reasons for Granting the Writ

1. This case presents a question not heretofore determined by this Court: does a shipowner's negligence in starting a shipboard fire, in navigable waters, render it liable to a fireman who is injured as a result of the fire? Under the common law, the negligent landowner is not liable to the injured fireman. This Court may rule otherwise. *Kermarec* v. *Compagnie Generale Transatlantique*, 1959, 358 U. S. 625, 630, 79 S. Ct. 406, 409, 3 L. Ed. 2d 550.[3]

In the instant case, the courts below adopted the common law rule. 155 F. Supp. 619, 627, 628; 257 F. 2d 538, 541; 180 F. Supp. 24, 26. "An occupier's negligence in starting a fire affords no ground for a fireman who is hurt while fighting it". 180 F. Supp. 24, 26.[4]

The common law rule has been rationalized on several grounds:

(a) The fireman is a licensee who cannot recover for the negligence of the landowner in starting the fire before he came on the premises: *Eckert* v. *Refiners Oil Co.*, 1923, 17 Ohio App. 221; *Wax* v. *Co-Operative Refinery Assn.*, 1951, 154 Neb. 805, 807, 49 N. W. 2d 707.

(b) The fireman is compensated by his governmental employer for injuries sustained in fighting a fire. *Lunt* v. *Post Printing Co.*, 1910, 48 Colo. 316, 110 Pac. 203.

(c) The fireman is trained and paid for assuming the very risks created by the fire. *Krauth* v. *Geller*, 1960, 31 N. J. 270, 157 Atl. 2d 129.

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[3] "The issue must be decided in the performance of the Court's function in declaring the general maritime law, free from inappropriate common-law concepts." *Kermarec*, *supra*, p. 630.

[4] Harper and James, Vol. 2, Law of Torts (1956 ed.), from which the quotation is taken, p. 1503, express no sympathy for the rule, pp. 1498-1505.

(d) Imposition of liability on the owner who negligently starts a fire for injuries to firemen would be an undue burden. *Krauth* v. *Geller, supra.*

These rationalizations, archaic and illogical, have produced decisional confusion and conflict. "For the admiralty law to import such conceptional distinctions would be foreign to its traditions of simplicity and practicality."[5]

(a) The licensee-invitee concept has been eliminated from the admiralty law. *Kermarec, supra.*

(b) The responsibility of the governmental employer to compensate its injured employee (fireman) should no more preclude said employee's third party suit against the tortfeasor than any other injured employee receiving compensation. Cf. *Seas Shipping Co., Inc.* v. *Sieracki*, 1946, 328 U. S. 85, 101-102, 66 S. Ct. 872, 90 L. Ed. 1096; *United States Fidelity & Guaranty Co.* v. *United States*, 2 Cir. 1945, 152 F. 2d 46, 48.[6]

(c) The alleged disability of the injured fireman to sue the negligent landowner because the fireman knowingly exposes himself to danger, simply conceals an *a priori* policy determination. Assumption of risk does not bar the seaman's recovery, *United States* v. *Lubinski*, 9 Cir. 1946, 153 F. 2d 1013, or the volunteer's. *Liming* v. *Illinois Cent. R.R.*, 1890, 81 Iowa 246, 253, 47 N. W. 66, 68; cf. *Wagner* v. *International Ry. Co.*, 1921, 232 N. Y. 176, 133 N. E. 437. Neither is it a factor where the fireman is permitted recovery under recognized "exceptions" to the rule, *e.g.*, other defects on premises, the violation of a safety regulation, *infra.*[7]

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[5] *Kermarec, supra,* p. 631.

[6] Equally illogical is the rationalization that the tax-paying landowner is *pro tanto* the employer of the fireman. Harper and James, *supra.*

[7] See also, *The Arizona* v. *Anelich*, 1936, 298 U. S. 110, 122-123, 56 S. Ct. 707, 80 L. Ed. 1075; *The Max Morris*, 1890, 137 U. S. 1, 14, 11 S. Ct. 29, 34 L. Ed. 586.

(d) The most candid rationalization was recently stated as follows: " . . . in the final analysis the policy decision is that it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered" by the professional firemen. *Krauth* v. *Geller*, *supra*, p. 274. Such a "horse and buggy" concept cannot be reconciled with current economic mores. The property owner today carries fire insurance to replace his loss and public liability insurance to indemnity the innocent victims of his negligence. These are accepted business costs for the small property owner, as well as for the public carrier, whose negligence creates large monetary exposure.*

The inequity of the common law rule is reflected in the "exceptions" which the courts have necessarily created to avoid injustice. The professional fireman has been allowed to recover from the negligent occupier where the negligent act was deemed to have continued after the fireman arrived upon the premises. *Houston Belt & Terminal Ry. Co.* v. *O'Leary*, Tex. Civ. App. 1911, 136 S. W. 601 (negligent handling of railroad cars caused initial explosion and fire); the owner violated a safety statute or ordinance, *Boudoin* v. *A. Daigger & Co.*, 1930, 255 Ill. App. 494 (handling and storage of benzol); *Cameron* v. *Kenyon-Connell Commercial Co.*, 1899, 22 Mont. 312, 56 Pac. 358 (storage of Hercules powder); *Drake* v. *Fenton*, 1912, 237 Pa. 8, 85 Atl. 14 (no guard or inclosure of elevator shaft); *Parker* v. *Bernard*, 1883, 135 Mass. 116, 119 (semble, policeman); *cf.* New York General Municipal Law, Sec. 205 a: an undisclosed dangerous condition on the premises caused the

* The shipowner who negligently sets fire to his vessel is liable to the injured seaman, *United States* v. *Lubinski*, 1946, 9th Cir. 153 F. 2d 1013, passenger, *cf. The Virginia*, 1920, 264 F. 986, D. C. Md., affd. *Hines* v. *Butler*, 1921, 4th Cir. 278 F. 877, guest, *Warnken* v. *Moody*, 1927, 5th Cir. 22 F. 2d 980, and other damaged vessels, *The Edmond J. Moran, Inc.* v. *The Harold Reinauer*, 1955, 2nd Cir. 221 F. 2d 306. The insurance premiums may be "burdensome", but the obligation is not against public policy.

accident, *Cities Service Oil Co.* v. *Dixon*, 1932, 14 Ohio L. Abs. 203 (open manhole in gasoline tank near fire); *Jenkins* v. *313-321 W. 37th St. Corp.*, 1940, 284 N. Y. 397, 31 N. E. 2d 503 (gasoline in closed room of sub-basement); *Meiers* v. *Koch Brewery*, 1920, 229 N. Y. 10, 127 N. E. 491 (coal hole in paved driveway); *Schwab* v. *Rubel Corporation*, 1941, 286 N. Y. 525, 37 N. E. 2d 234 (open shafts flush with floor); *Shypulski* v. *Waldorf Paper Products Co.*, 1951, 232 Minn. 394, 45 N. W. 2d 549 (unstable warehouse wall); the explosion was not a normal risk assumed by a fireman. *Smith* v. *Twin-State Gas & Electric Co.*, 1928, 83 N. H. 439, 448, 144 Atl. 57 (explosion while testing for presence of escaping gas); *Rubl* v. *City of Philadelphia*, 1943, 346 Pa. 214, 29 Atl. 2d 784 (gas explosion); the fire occurred outside the municipal limits; *Clinkscales* v. *Mundkoski*, 1938, 183 Okla. 12, 79 P. 2d 562.

Logically, these exceptions refute every one of the apologies for the common law rule. Rather than import into the general maritime law a source of decisional confusion and make-shift accommodation, this Court under its unique admiralty jurisdiction should adopt a uniform rule that the negligent shipowner is responsible to the fireman injured as a result of the fire.

Such a rule would be consonant with the pervasive governmental concern that all possible precautions be taken to prevent shipboard fire.[9] It would protect the professional fireman, who delicates his talents and sometimes his life to protecting the public and the private owner from the havoc of fire. Such a rule would be consistent with the basic principles of tort responsibility. Under it, the respondent herein would be responsible to the petitioner, whose presence on the vessel was foreseeable and whose injuries sus-

[9] See Appendix, pp. 1a-5a, Fire Prevention and Fire Fighting Regulations of the United States Coast Guard for Cargo, Tankers and Passengers Vessels.

tained in the explosion were proximately caused by the respondent's conceded negligence in causing the fire.

2. Even if the general maritime law were to recognize the common law rule protecting the owner from liability to the injured fireman, petitioner comes within a recognized exception to the rule. Common law jurisdictions, by statute and decisional law, have permitted the professional fireman to recover from the owner who violated a safety statute, ordinance or governmental regulation. See e. g. *Bandosz* v. *A. Daigger & Co., supra*; *Cameron* v. *Kenyon-Connell Commercial Co.*, 1899, 22 Mont. 312, 56 Pac. 358 (improper storage of Hercules powder); *Carlock* v. *Westchester Lighting Co.*, 1935, 268 N. Y. 345, 197 N. E. 306 (failure to carry electric wires at required height); New York General Municipal Law, Sec. 205-a; *cf. Racine* v. *Morris*, 1911, 201 N. Y. 240, 94 N. E. 864 (policeman, failure to guard elevator shafts).

At the time of the M S Lisholt disaster the following Canal Zone Regulations were in effect:

Rule 8.55:[10]

> "Responsibility for all connections and operations aboard the vessel during bunkering or cargo transfer operations remains with the vessel's crew."

Rule 45:[11]

> "A vessel lying at any pier, dock or wharf in the Canal Zone shall at all times keep a satisfactory watch for fire and have suitable fire-fighting apparatus ready for immediate use . . ."

The record establishes violation of Rule 45 requiring "a satisfactory watch for . . .". But for such violation

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[10] 51, 35 C. F. R. § 4.123b, Subpt. E.

[11] 56, 35 C. F. R. § 4.47, Subpart C.

the fire would not have occurred. The Motorman and third Engineer were on watch during the bunkering (Finding 4, 10a). Had they performed a proper fire watch, they would not have permitted the self-closing valve to the sounding tube to remain lashed in an open position while the tank was being filled. If the valve had been closed, the diesel oil could not have spouted out of the sounding tube into the engine room (24-25, 27, 86-87, 97). Neither would they have permitted the use of a sounding tube adjacent to a sparking electric motor, which could ignite the vapor of light diesel oil (30, 94-96, 91-92). Respondent's own expert, Chief Burke, admitted that this was not good practice (199).

The record further establishes the vessel's failure to "have suitable fire-fighting apparatus ready for immediate use." There was "no fire-fighting system independent of the engine room" (Finding 6, 11a) as there should have been (197-198). When the fire broke out, the pumps in the engine room became immediately inoperative (212). There was no other mechanism available to put out or contain the fire.

The absence of fog nozzles aboard the vessel was particularly serious. All witnesses confirmed the advantage of such nozzles in the event of an oil fire (32, 82-83, 195-197). Chief Burke testified that not only would a fog nozzle prevent the spread of the fire, but it would also permit the man using it to fight the fire at a closer range (197).

The respondent may not have intended to admit the violation of Canal Zone Rule 45 when it conceded its negligence in causing the fire. This however, is established independently, by the record. The Courts below, therefore, erred in failing to apply the recognized exception to the common law rule. When a fire results from a violation of a safety regulation, the injured fireman may hold the negligent occupier responsible.

3. The validity of the judgments of the Courts below rest upon one crucial finding: the duty of the respondent

to take affirmative action regarding the gas fumes did not arise until shortly after 4:30 P. M. when "it is conceded that notice of a condition involving escaping gas was given an agent of respondent (Hignett)[12]." This duty did not arise before, in the view of the Courts below, because of two essential assumptions made by the respondent which insulated it against prior notice: a) the fumes were of freon gas known to be harmless (Finding 9, 11a; Finding 12, 59a-60a); b) the gas fumes and smoke were the normal aftermath of a fire, and the Fire Department was in control (Finding 9, 11a, 213).

In fact, both assumptions were subjective judgments contradicted by the objective facts. The Chief Steward was not sure of the identity of the gas (Finding 9, 11a). The Master and Chief Officer did not request the Chief Engineer, familiar with the refrigeration system, to investigate (44). The Chief Engineer did not think it necessary to make an inspection, because the Fire Department was in control (213). Nevertheless, not one officer of the vessel thought it necessary to bring the gas fumes to the attention of the Fire Department before 4:30 P. M. (Finding 17, 16a, 44). That the ship's representatives should have been concerned about the gas is clearly established by the record. As early as 11:30 A. M. Kinsman was sufficiently concerned about the gas and the safety of his men, to obtain an opinion from Panama Canal Company employees he found on the dock (Finding 12, 59a-60a). But if Kinsman wrongly assumed that the gas was freon (*Ibid.*, 220-221) and therefore obtained a valueless opinion, this should not have deterred Hignett, who was present at the conference, from making an independent inquiry (Finding 12, 60a). Hignett's failure to report Kinsman's concern to the Fire Department or to the ship's officers, particularly the Chief Engineer, was actionable negligence as early as 11:30 A. M. This negligence was compounded by the Chief

[12] Opinion of Ryan, C. J., 49a.

Steward's admission that the gas fumes were the subject of conversation among the longshoremen from the time they began unloading at 3:00 P. M. (38-39), and his failure to bring this to the attention of the Chief Engineer or the Fire Department. It was further compounded by Hignett's failure to do at 11:30 A. M. what he later did at 4:30 P. M., i.e., request a blower to dissipate the fumes and call for a chemist (Finding 20, 62a).

Had any of these measures been taken before 4:30 P. M., the tragic concatenation of events leading to the explosion could have been prevented.

The observation of the Court of Appeals, therefore, that the ship's representatives and officers were "lulled * * * into a false security" [13] is reminiscent of the premium on ignorance which protects the licensee at common law.[14] Though both opinions below purport to apply the *Kermarec* mandate, in fact, they do not. The "duty of exercising reasonable care under the circumstances of each case" cannot be said to have been properly applied when the rationale of the opinions below was tantamount to the following non-sequitur: As long as the respondent lulled itself into false security that the gas odors were not dangerous it owed no duty to petitioner to do anything about it. Only when the illusion was destroyed did its duty first arise. Unfortunately, knowledge came too late.

The key finding that respondent owed no duty to petitioner before 4:30 P. M. was "clearly erroneous", *McAllister* v. *United States*, 1954, 348 U. S. 19, 75 S. Ct. 6. The error involved the application of a legal standard of duty and requires a reversal of the judgment below. *Beyer* v. *LeFevre*, 1902, 186 U. S. 114, 119, 22 S. Ct. 765; *Baum-*

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[13] 282 F. 2d 816, 817.

[14] See, Law Reform Committee, Third Report, Cmd. No. 9305 (1954) pp. 31-32, previously filed with the Court by the petitioner in *Kermarec*, *supra*.

gartner v. *United States*, 1944, 322 U. S. 665, 671, 64 S. Ct. 1240; *Offutt* v. *United States*, 1954, 348 U. S. 11, 15, 75 S. Ct. 11.

4. Petitioner was erroneously denied the benefit of the doctrine of unseaworthiness.

a. The M/S Lisholt was a vessel in navigable waters notwithstanding it was no longer capable of self-propulsion.[15] It was, if nothing more, a barge with stores on board which respondent was unloading for its economic benefit through stevedores which it had hired. It had been towed with its stores on board from one pier to another before the unloading operations began (Finding 14, 60a).

b. Petitioner, as a fire watchman, was doing the traditional work of a seaman following the subduing of a fire at sea. The prevention of shipboard fires is a major duty of ship personnel. It is the subject of extensive and detailed Coast Guard Regulations.[16] The danger of fire is as applicable to a "dead" ship as to a live one.[17]

c. The Courts below held that petitioner could not invoke the doctrine of unseaworthiness because he did not "rely on the seaworthiness of something actually unseaworthy."[18] "There can be no duty to furnish a seaworthy ship to a fireman who was on the vessel knowing it to be unseaworthy, and was on board because of its unseaworthiness".[19]

In view of the uncertainty which now prevails among the admiralty bar regarding the scope and extent of the

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[15] See dissenting opinion, Sobeloff, C. J., *Roper* v. *United States*, 4 Cir. 1960, 282 F. 2d 413, 418.

[16] See Appendix, pp. 1a-5a.

[17] Cf. *Roper* v. *United States*, *supra*, pp. 416-417; ftn. 4, p. 417.

[18] 70a, *Bruszewski* v. *Isthmian Steamship Co.*, 3 Cir. 1947, 163 F. 2d 720, 722.

[19] *McDaniels* v. *M/S Lisholt*, 2 Cir. 1958, 257 F. 2d 538, 540; 282 F. 2d 816, 817.

doctrine, it is important that this Court clarify the issue of "reliance upon a warranty".

Had the fire occurred at sea, there would be no question that a seaman injured in a subsequent explosion could invoke the doctrine. So could the longshoreman unloading stores. In these cases, the fact that the men were injured while working in a fire-gutted vessel would be immaterial. The breach of the original warranty would be deemed controlling in the case of the seaman. The longshoreman could rely upon the representation that the vessel, though burnt, was nevertheless safe for his type of work.

Should it make any difference, however, that through wholly fortuitous circumstance, the fire occurs in port, and it is a port fireman who stands the fire watch instead of the seaman? Where the fire occurred as here, because of an unseaworthy vessel, it is foreseeable that a fire watch will be particularly necessary after the fire is subdued; that the vessel will be towed to port; inevitably Fire Department and other government representatives will board the vessel to make inspections. Should the owner of an unseaworthy vessel escape the foreseeable consequences of its act solely because those who later board the vessel, and are injured because of the fire, do so knowing the fire had already occurred?

It would seem that the principle of liability for consequential damages should apply as much in the case where injury proximately results because of an unseaworthy vessel, as where it results because of the negligent act of a shipowner. Though the benefits of the doctrine of unseaworthiness are "unusual", and may have been intended originally to protect seamen only, its "humanitarian" purpose would be best served by extending the scope of its benefits to all who are injured by reason of its breach. In short, this Court is again urged to reconsider the materiality of "status" in its application to the doctrine of unseaworthiness.

Wherefore, petitioner respectfully prays that a writ of certiorari issue under the seal of this Court to review the judgment of the United States Court of Appeals for the Second Circuit, to reverse said judgment and to remand the cause to the District Court for entry of judgment in favor of the petitioner in the stipulated sum of $102,500.[20]

December 20, 1960.

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EDWARD J. MALAMENT,
Counsel for Petitioner.

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[20] "If I were to award him damages, I would set the amount in the sum of $102,500." Ryan, C. J. 45a, 180 F. Supp. 24, 26.

APPENDIX

Fire Prevention and Fire Fighting Regulations of the United States Coast Guard for Cargo, Tankers and Passenger Vessels

Cargo and Miscellaneous Vessels

Extinction of fire among crew's duties	46 C.F.R. 97.13-10(a)(3)
Signals alerting crew to fire alarm stations	46 C.F.R. 97.13-15(b)
Signals dismissing crew from fire alarm stations	46 C.F.R. 97.13-15(b)(2)
Fire drills once a week	46 C.F.R. 97.15-35
Participation of crew in fire drills	46 C.F.R. 97.15-35(b)
Testing of fire-fighting equipment	46 C.F.R. 97.15-60
Master's and officer's absolute duty to provide proper fire watch and fire precaution	46 C.F.R. 97.27-5(a)

"Nothing in this subpart shall exonerate any master or officer in command from the consequences of any neglect to keep a proper * * * fire watch * * *. When circumstances require it, additional watches shall be maintained to guard against fire or other danger and to give an alarm in case of accident or disaster."

Logging of weekly fire drills	46 C.F.R. 97.35-5
Marking of fire extinguisher equipment	46 C.F.R. 97.37-10, 46 C.F.R. 97.37-13, 46 C.F.R. 97.37-15, 46 C.F.R. 97.37-23
Fire main system	46 C.F.R. 95.05-5

Fire Prevention and Fire Fighting Regulations of the United States Coast Guard for Cargo, Tankers and Passenger Vessels

Fixed fire extinguishing system	46 C.F.R. 95.05-10
Portable fire extinguishers	46 C.F.R. 95.05-15
Sand	46 C.F.R. 95.05-15
Fire Main System, details	46 C.F.R. 95.10
Steam Smothering System, details	46 C.F.R. 95.13
Carbon Dioxide Extinguishing System, details	46 C.F.R. 95.15
Portable fire extinguishers system, details	46 C.F.R. 95.50
Fire axes	46 C.F.R. 95.60
Passenger Vessels	
Extinction of fire among crew's duties	46 C.F.R. 78.13-5(a)(3)
Signals alerting crew to fire alarm stations	46 C.F.R. 78.13-10(b)(1)
Signals dismissing crew from fire alarm stations	46 C.F.R. 78.13-10(b)(2)
Fire drills once a week	46 C.F.R. 78.17-50(a)
Participation of crew in fire drills	46 C.F.R. 78.17-50(b)
Testing fire-fighting equipment	46 C.F.R. 78.17-50(b)(1), 46 C.F.R. 78.17-80(a), 46 C.F.R. 78.17-80(b)
Master's and officer's absolute duty to provide proper fire watch and fire precaution	46 C.F.R. 78.30-20(a)

Fire Prevention and Fire Fighting Regulations of the United States Coast Guard for Cargo, Tankers and Passenger Vessels

"Nothing in this subpart shall exonerate any master or officer in command from the consequences of any neglect to keep a proper • • • fire watch. • • • When circumstances require it, additional watches shall be maintained to guard against fire or other danger and to give an alarm in case of accident or disaster."

Logging of weekly fire drills	46 C.F.R. 78.37-5(a)(1)
Marking of fire extinguisher equipment	46 C.F.R. 78.47-13, 46 C.F.R. 78.47-15, 46 C.F.R. 78.47-17, 46 C.F.R. 78.47-20, 46 C.F.R. 78.47-30, 46 C.F.R. 78.47-67
Marking of fire doors	46 C.F.R. 78.47-35
Establishing fire detecting system	46 C.F.R. 76.05-1
Fire main system	46 C.F.R. 76.05-15
Fixed fire extinguishing systems	46 C.F.R. 76.05-20
Portable fire extinguishers	46 C.F.R. 76.05-25(a)
Sand	46 C.F.R. 76.05-30(a)
Fire main system, details	46 C.F.R. 76.10
Steam smothering system, details	46 C.F.R. 76.13
Carbon Dioxide extinguish systems, details	46 C.F.R. 76.15
Foam extinguishing systems, details	46 C.F.R. 76.17

Fire Prevention and Fire Fighting Regulations of the United States Coast Guard for Cargo, Tankers and Passenger Vessels

Manual sprinkling system, details	46 C.F.R. 76.23
Automatic sprinkling system, details	46 C.F.R. 76.25
Electric fire detecting system, details	46 C.F.R. 76.27
Pneumatic fire detecting system, details	46 C.F.R. 76.30
Smoke detecting system, details	46 C.F.R. 76.33
Manual alarm system, details	46 C.F.R. 76.35
Portable fire extinguishers systems, details	46 C.F.R. 76.50
Fire axes	46 C.F.R. 76.60
Tank Vessels.	
Extinction of fire among crew's duties	46 C.F.R. 35.10-1(b)(2)
Signals alerting crew to fire alarm stations	46 C.F.R. 35.10-5(a)
Signals dismissing crew from fire alarm stations	46 C.F.R. 35.10-5(a)(3)
Fire drills once a week	46 C.F.R. 35.10-5(d)
Testing of fire-fighting equipment	46 C.F.R. 35.10-5(e)
Participation of crew in fire drills	46 C.F.R. 35.10-5(d)
Logging of weekly fire drills	46 C.F.R. 35.30-5(f)
Fire, matches and smoking control	46 C.F.R. 35.30-5

Fire Prevention and Fire Fighting Regulations of the United States Coast Guard for Cargo, Tankers and Passenger Vessels

Explosives control	46 C.F.R. 35.30-25
Marking of fire equipment	46 C.F.R. 35.40
General fire-fighting requirements	46 C.F.R. 34.01
Inspections of fire-fighting equipment	46 C.F.R. 34.05
Fire fighting equipment	46 C.F.R. 34.10
Establishing fire extinguishing systems, general	46 C.F.R. 34.15, 46 C.F.R. 34.20, 46 C.F.R. 34.21, 46 C.F.R. 34.22
Hand fire extinguishers	46 C.F.R. 34.25
Fire axes	46 C.F.R. 34.30
Sand boxes	46 C.F.R. 34.35
Fire fighting equipment for tank barges	46 C.F.R. 34.40

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 330—October Term, 1959

(Argued May 12, 1960 Decided September 22, 1960)

Docket No. 26138

—o—

JAMES E. McDANIEL,

Libelant-Appellant,

v.

M/S LISHOLT, her engines, etc., and A/S LISE, her owner,

Respondent-Appellee

—o—

Before: CLARK, MOORE, and FRIENDLY, *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge*.

James E. McDaniel appeals from the dismissal of his libel for damages for personal injuries against M/S Lisholt and her owner, A/S Lise, D. C. S. D. N. Y., 180 F. Supp. 2. Affirmed.

HUGH S. WILLIAMSON, of MACLAY, MORGAN & WILLIAMS, New York City (WILLIAM I. STODDARD, of MACLAY, MORGAN & WILLIAMS, New York City, on the brief), for Libelant-Appellant.

FRANCIS X BYRN, of HAIGHT, GARDNER, POOR & HAVENS, New York City (JAMES M. ESTABROOK and THOMAS F. MOLANPHY, of HAIGHT, GARDNER, POOR & HAVENS, New York City, on the brief) for Respondent-Appellee.

Opinion of United States Court of Appeals for the Second Circuit

CLARK, *Circuit Judge*:

On the previous appeal of this case this court held that respondent was not under a duty to provide a seaworthy ship to libelant, a shore-based fireman, and that its only duty to libelant, whose status aboard the ship was that of a licensee, was to refrain from willful or wanton negligence. *McDaniel* v. *The M S Lisholt*, 2 Cir., 257 F. 2d 538, affirming D. C. S. D. N. Y., 155 F. Supp. 619. The Supreme Court in a Per Curiam opinion, 359 U S. 26, remanded the cause "for a new trial in light of *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625." Upon remand, the district court, per Chief Judge Ryan, found that respondent's actions were not negligent as to libelant and dismissed the libel. D. C. S. D. N. Y., 180 F. Supp. 24. This appeal followed.

Since the facts of the case are described at length in the two district court opinions, as well as in the prior opinion of this court, we find it unnecessary to restate the details of the accident beyond those required for our discussion. A fire broke out on the M S Lisholt at about 12:45 a. m. on February 6, 1954, while she lay moored at Balboa Docks, Panama Canal Zone. The fire was considered extinguished at approximately 8:00 a. m., and the Zone Fire Department after inspecting the vessel removed all but two firemen who remained aboard as fire watchmen. Later in the day the number was reduced to one, to which position libelant was assigned at 4:00 p. m. At approximately 5:30 p. m., while libelant was inspecting the vessel's freeze box, investigating reports of a gaseous odor, an explosion occurred from which he received serious injuries. It was subsequently ascertained that the cork insulation in the interior of the wall of the freeze box had been smoldering since the fire, creating an explosive atmosphere of carbon monoxide and other unknown gases.

We need pause only briefly with libelant's assertion that he was entitled to a warranty of seaworthiness. The short

answer is that the contention was disposed of by this court's prior decision, since we do not read the Supreme Court's opinion as disapproving our ruling on this issue. As we there stated, "There can be no duty to furnish a seaworthy ship to a fireman who was on the vessel knowing it to be unseaworthy, and was on board because of its unseaworthiness." 2 Cir., 257 F. 2d 538, 540. See also *West* v. *United States*, 361 U. S. 118; *Filipek* v. *Moore-McCormack Lines, Inc.*, 2 Cir., 258 F. 2d 734, certiorari denied 359 U. S. 927; *Bruszewski* v. *Isthmian S.S. Co.*, 2 Cir., 163 F. 2d 720, certiorari denied 333 U. S. 828.

Libelant, in his brief, page 10, bases his claim of negligence upon the "contention that the officers of the vessel were put on notice repeatedly as to the unusual and potentially dangerous condition of the freeze box." But we agree with Chief Judge Ryan's conclusion that respondent could not be charged with such notice before 4:30 p. m. Finding No. 9 by Judge Edelstein at the first trial, D. C. S. D. N. Y., 155 F. Supp. 619, 621, as modified by stipulation between the parties, sets forth that between 9:00 and 10:00 a. m. the chief cook and chief steward noticed "gas or smoke or something" in both the chill and freeze rooms. It was also found, however, that, since there was smoke throughout the ship, they did not take much notice of it and did not suspect any danger. Further the steward knew that the refrigerant was harmless freon gas. Neither this inspection nor the steward's report thereof to the master constituted notice of the dangerous condition. The master's belief that there was so much smoke in the chill and freeze rooms that nobody could go down there is indicative only of his decision following the steward's report to postpone the removal of the stores until the smoke had cleared away. At about 11:30 a. m. a slight refrigerant odor was detected in the freeze room; but Kinsman, assistant to the superintendent, Terminals Division, Panama Canal Company, and Hignett, representative of the vessel's general agent in the Canal Zone,

were assured that the refrigerant was freon, which was neither inflammable nor toxic. This belief that the odor was that of freon gas, coupled with knowledge of the harmlessness of such gas, lulled the ship's officers and representatives into a false security.

About 3:00 p. m. the discharging of stores from the provision and chill rooms, adjacent to the freeze room, commenced. Sometime after 4:30 p. m., stevedore foremen Cole and Freeman inspected the freeze room and noticed a strong concentration of gas. Cole reported this condition to ship's agent Hignett in the presence of the first officer, stating that "he was not too happy about the condition of the freeze box and that they had been in it but had closed it again." Hignett ascertained that a chemist had been sent for and that a blower had been ordered installed to ventilate the area, although it was not yet in operation. Freeman notified libelant that "the men would not work in the meat box because of the presence of gas." Libelant thereupon accompanied Freeman to the freeze room and upon entering detected what he believed to be ammonia gas, which he thought highly explosive. He went up on deck to notify the fire department, but upon meeting the chemist decided to return to the freeze room for a further inspection. It was during this inspection that the explosion occurred.

While respondent's officers thus had notice at approximately 5:00 p. m. that conditions in the freeze room were deteriorating, it is not clear how they could have prevented libelant's injuries. Any further action in instigating an inspection of the freeze room would seemingly have consisted in asking libelant to investigate the reported gaseous odor. But this was already occurring through Freeman's intervention. Libelant contends that respondent was under a duty to order the area cleared; but while this might be relied upon by longshoremen who were injured or killed, it is of no avail to libelant, who knew that an explosive gas was present when he entered the area a second time.

Further, respondent had no power to prevent libelant from entering the area. It is suggested, however, that the explosion was caused by the lighting of a cigarette by the stevedore, and thus removal of the men would have prevented the accident. But two trial judges have found that libelant's evidence was insufficient to establish this as the cause of the explosion; and we cannot say that this finding was "clearly erroneous." *McAllister* v. *United States*, 348 U. S. 19.

Libelant also seems to assert that if respondent was negligent as to the longshoremen, it was negligent as to him, since "the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 632. But the Court was there concerned with rejecting the conceptual distinctions between the duty owed to an "invitee" and a "licensee." A libelant who seeks recovery for negligence must still show a breach of duty owing to himself, *Palsgraf* v. *Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253, and, more fundamentally, that his injuries would not have occurred but for such breach of duty.

The judgment is affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of September, one thousand nine hundred and sixty.

Present:

HON. CHARLES E. CLARK,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
Circuit Judges

JAMES E. McDANIEL,
Libelant-Appellant.

v.

M/S LISHOLT, her engines, boilers, tackle, apparel, etc., and A/S LISE,
Respondent-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A DANIEL FUSARO,
Clerk.

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JAMES B. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 593

JAMES E. McDANIEL,

Petitioner,

—*against*—

[illegible] LISHOLT, [illegible] and
A. S. LISE, [illegible],

Respondents.

BRIEF OF RESPONDENT A. S. LISE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM 1960

JAMES E. McDANIEL,
Petitioner,
—against—
m/s LISHOLT, her engines, etc. and
A/S LISE, her owner,
Respondents.

No. 593

BRIEF OF RESPONDENT A/S LISE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

Respondent submits that the questions posed by petitioner do not reveal any conflict in decisions between this Court and the Court of Appeals or among the Courts of Appeals. There are no particular reasons why petitioner's status as a fireman should be of special interest to this Court. He is only one of many types of incidental visitors aboard ships whose rights and status have already been set forth in *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625.

The instant case was remanded for a new trial in "light of *Kermarec*" 359 U. S. 26, to determine the factual issue of "reasonable care under the circumstances" of this case. The two lower courts have now ruled adversely to petitioner on this issue.

Respondent submits that the petition raises only the following issues:

1. Whether petitioner's first point, that respondent is liable for any consequential injuries due to a negligently created fire, merit the consideration of this Court where:

(a) This theory, although advanced and ruled out at the first trial, 155 F. Supp. 619, 625 (66a-67a)* was not petitioner's theory upon re-trial, 180 F. Supp. 24, 26 (47a), nor was it urged in briefs or argument before the Court of Appeals.

(b) Such a proposition, imposing a continuing, absolute liability to firemen for any original negligent creation of the fire, is in conflict with the spirit of *West* v. *United States*, 361 U. S. 118.

(c) Irrespective of what caused the fire, petitioner was not injured in the fire itself but in a flash explosion, touched off by an igniting agent, not attributable to any negligence of defendant. This explosion occurred 9½ hours after the fire was believed extinguished by the Fire Department when petitioner was himself in charge of investigating a gas condition aboard the vessel.

2. Whether petitioner may introduce at this time a claimed violation of safety regulations not raised below, explicitly found against him at the first trial and not thereafter challenged.

3. Whether this Court, in the exercise of its discretionary certiorari jurisdiction, may be called upon to probe the record in an attempt to seek counter inferences even though the trier of the facts finds lack of notice to respondent of any dangerous condition until approximately the same time as petitioner had the same notice, which finding is unanimously upheld by the Court of Appeals.

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*Numbers followed by "a" refer to the combined appendices forwarded from the Court of Appeals.

4. Whether the decisions of this Court can be interpreted to impose an obligation to provide a seaworthy vessel to a professional fireman, aboard the vessel irrespective of the consent of the owner, knowing the vessel to be unseaworthy and only on board because of that unseaworthiness.

STATEMENT OF THE CASE

This action was "remanded to the District Court for a new trial in light of *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625" *McDaniel* v. *The Lisholt*, 359 U. S. 26.

Applying the test dictated by the *Kermarec* decision of "reasonable care under the circumstances of each case", Chief Judge Ryan of the Southern District of New York, the trier of the facts herein,* found no negligence on the part of respondent, 180 F. Supp. 24.

In unanimously affirming the Court of Appeals for the Second Circuit, 282 F. 2d 816, not only failed to find Judge Ryan's holding clearly erroneous but agreed that respondent's conduct was reasonable under the circumstances. Significantly, the opinion of the Court of Appeals was written by former Chief Judge Clark whose dissenting views in the *Kermarec* decision in the Court of Appeals 245 F. 2d 175, 179 undoubtedly had much to do with the granting of certiorari in that case and eventual reversal thereof by this Court. See 358 U. S. 625, 631.

In revisiting the courts below, petitioner, therefore, has had his evidence and arguments considered by the experienced Chief Judge of the United States District Court for

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*See *United New York & New Jersey Sandy Hook Pilots Association et al.* v. *Halecki*, 358 U. S. 613, 619 "It was for the triers of fact to determine whether defendants were responsibly negligent . . ."

the Southern District of New York and reviewed by the even more experienced former Chief Judge of the United States Court of Appeals for the Second Circuit, who not only failed to dissent here as seen, but authored the unanimous affirming opinion. After two trials and two appeals respondent submits that petitioner has had his full day in court.

Perhaps recognizing that he cannot seriously question the evaluation of the evidence against him or the inferences arising therefrom, and further that he has failed to show in two trials that any negligence of respondent touched off the flash explosion, the proximate cause of his injuries, which took place in an area under his immediate control, 9½ hours after the fire was believed extinguished by the Fire Department, petitioner has resorted to the tactic of re-introducing abandoned but superficially eye-catching theories into this petition.

Thus, although Judge Ryan points out in his opinion, 180 F. Supp. 24, 26 (p. 47a), that since the fire was considered extinguished at 8 A. M., liability must be founded on some other act or acts of negligence after that time and "Indeed it is under this theory that libelant presents his case", still, petitioner now claims a cause of action arising from any original negligence of respondent in creating the fire. Petitioner employs this tactic although Judge Ryan's quoted remarks were not challenged by petitioner in any post-decision application before the District Court and not even discussed by petitioner in the Court of Appeals.

In the same vein, petitioner urges, in his Point 2, claimed violations of certain safety regulations, violations which not only have never been established, but which were specifically repudiated by the first trial Judge.

Apart from the attempt to reassert discarded theories of liability, petitioner presents only a quarrel with both the District Court's and Court of Appeals evaluation of

the evidence and inferences therefrom, none of which can be deemed clearly erroneous since based either on stipulated findings or uncontradicted testimony.

Other than being dissatisfied with the results below, petitioner presents no important or special reasons why certiorari should be granted. No conflicts have been shown between decisions of this Court and the Court of Appeals or among the Courts of Appeals. Petitioner offers no particular reason why this Court should intervene in a case tha was remanded by this Court for factual considerations under the standard of care set up in the *Kermarec* decision.

Examination of the authorities reveals a dearth of cases involving injury to firemen on ships as contrasted with litigation with respect to seamen, longshoremen or other harbor workers. It may safely be said that only a fraction of the total services rendered by shoreside firemen are performed aboard vessels and that such firemen are but occasional visitors to the maritime community. As such visitors their rights and status have already been defined in the *Kermarec* case. That petitioner was a fireman is a factual, not a legal circumstance in evaluating whether or not respondent exercised "reasonable care under the circumstances" toward him. Petitioner's status as a fireman, therefore is not a matter of special concern to the maritime law.

At most, petitioner presents a certain amount of uncertainty among state courts with respect to rights of, and obligations owed, firemen. Such a situation is not the responsibility of this Court. If it exists, it is due to an attempt to apply broad concepts to varying factual situations. Respondent submits that the facts *of this case* present no occasion for this Court to intervene, especially not to do so to enunciate a selective policy of absolute and continuing liability for the original negligent starting of the

fire to firemen coming aboard a vessel, following a fire, in an effort to limit, remedy or investigate that condition and yet denying similar causes of action on analogous facts to repairmen. See *West* v. *U. S.*, 361 U. S. 118.

THE FACTS

On pages 3, 4 and 5 of the petition, petitioner attempts to demonstrate the specific negligence of respondent in starting the fire. No court has seen fit to discuss such claimed specifications of negligence because as the first District Court held, 155 F. Supp. 619, (Finding 3, Appendix p. 55a):

> "Neither the cause of the overflow, nor the source of ignition (of the fire) nor the seaworthiness or unseaworthiness of the m/s Lisholt's engine-room equipment need be determined inasmuch as claimant-respondent has admitted that it was jointly at fault with the Panama Canal Company in starting the fire." (Parenthetical reference supplied)

Since the specifications of negligence in starting the fire were never in issue before any court, respondent does not feel called upon here to refute the multiple claims of negligence alleged. This is especially true where the issue of responsibility for the original fire was not pursued on remand.

On pages 5 through 8 of the petition, petitioner seeks to summarize the events from the time that the fire was considered extinguished at approximately 8 A. M. on February 6, 1954 until approximately 5:30 P. M. when the explosion occurred.

Petitioner submits that this summary represents an incomplete account of the facts, oriented to petitioner's argument. There are many references to the original record, completely unnecessary in a case where the find-

ings were stipulated or otherwise found by the second District Court and affirmed by the Court of Appeals.

Stipulated Findings 7 through 17 (57a-61a with 9 partially stipulated at 11a), cover the events from the time when the fire was considered extinguished until approximately 4 P. M. when petitioner returned to the vessel. Having been stipulated they need not be summarized. Respondent relies on them *in toto* as stipulated.

Stipulated Findings 19 through 24 (62a-63a) cover the period from the time petitioner came aboard until the explosion. Respondent also relies on these findings as stated.

Stipulated Findings 26, 27 and 30 through 36 (63a-64a) refer to the circumstances existing at the time of the explosion.

Findings at the original trial which libelant refused to stipulate, 18, 28, 37 part of 38 and 39 (61a-66a) had largely to do with petitioner's duties and authority aboard the vessel. Judge Ryan pointed out at (45a) that the principal issues which could not be agreed upon were:

> "(1) the duties and authority of a fire watchman and (2) the igniting agent which acted as the mainspring in triggering the explosion."

As to (1), the findings made by Chief Judge Ryan at the second trial (45a-46a and 50a-51a) with respect to the duties and authority of a fireman acting as a fire watchman are essentially in accord with the original findings 18, 28, 37, 38 and 39 made by Judge Edelstein on the same subject.

As to (2), just as petitioner has added an issue here with respect to the responsibility for the original commencement of the fire, so too has he dropped the issue of what proximately caused the explosion which resulted in his injuries. Neither Judge Edelstein in Finding 25, (63a) nor Chief Judge Ryan at the second trial, (46a) were able

to find the cause of ignition of the explosion from the multiplicity of theories. The Court of Appeals therefore said (Petitioner's Appendix p. 10a):

> ". . . we cannot say that this finding was 'clearly erroneous' *McAllister* v. *United States*, 348 U. S. 19".

Taking those facts stipulated and those consistently found by two District Courts is the only orderly way the facts can be appraised herein.

Respondent therefore urges the Court to disregard the presentation of facts by petitioner in favor of the stipulated facts and those otherwise found by the District Court as affirmed by the Court of Appeals.

POINT I*

RESPONDENT'S LIABILITY TO PETITIONER HEREIN CANNOT BE PREDICATED UPON THE ORIGINAL CREATION OF THE FIRE.

Petitioner maintains that the respondent is liable to him for negligence in starting the fire. Respondent submits that this theory should be rejected for the following reasons:

(1) *This issue was not raised below.* Although raised at the first trial and rejected by the trial court (Finding 3, p. 56a—Conclusion of Law 2, pp. 66a-67a), it was not petitioner's theory upon remand, as the second District Court held (p. 47a).

At the second trial, it was respondent's position that if it owed petitioner a duty to refrain from negligently start-

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*Respondent's points correspond to the question posed on pp. 2, 3 herein.

ing fires on its vessel then there was no need for this Court to remand for a new trial in the light of *Kermarec*. but merely for an assessment of damages.

At the new trial Chief Judge Ryan ruled that respondent's admission of fault regarding the starting of the fire (p. 46a)

> "is not dispositive of liability in this case."

He further found (47a),

> "Since the fire was considered extinguished at 8 A. M., liability must be founded on some other act or acts of negligence after that time *and indeed it is under this theory that libelant presents his case.*" (Emphasis supplied).

These statements as to lack of duty, the intervention of time between the fire and the explosion and, most significantly, the comment as to what petitioner's theory was in the District Court, were not challenged either by any rehearing application in the District Court or on appeal in the Court of Appeals where this theory of liability was not even broached.

The belated effort to introduce a factual discussion of the cause of the fire, together with a legal theory of liability predicated thereon, not urged in the District Court on remand, or in the Court of Appeals, demonstrates the lack of any real ground for setting aside the District Court decision dismissing the libel, as unanimously affirmed by the Court of Appeals. If petitioner had any real convictions as to this theory (which had been in the case originally), he would have earnestly supported them in the District Court on remand. Especially would he have taken issue in the Court of Appeals with the District Court's statement as to what the issues were and not attempt to whipsaw theories between the Courts below and this Court.

It was believed by respondent that this issue had been laid to rest along with the other defunct issues such as the claim of a delayed alarm, the claimed violation of the International Convention for Safety of Life at Sea, the claimed "callous indifference" of ship's personnel, all of which formed part of petitioner's original scattershot assault upon respondent. Petitioner may argue that these issues were not dead but sleeping, but respondent submits that, having abandoned them in the Court below, he may not now bring them up in this Court; *Badger* v. *Ranlett*, 106 U. S. 255, 259-260; *Saltonstall* v. *Birtwell*, 164 U. S. 54, 70; *Tyrrell* v. *Dist. Columbia*, 243 U. S. 1, 4-6; *Sonzinsky* v. *United States*, 300 U. S. 506, 514; *Delgadillo* v. *Carmichael*, 332 U. S. 388, 391; *Weade* v. *Dichmann Co.*, 337 U. S. 801, 808; *United States* v. *Howard*, 352 U. S. 212, 217; *California* v. *Taylor*, 353 U. S. 553, 557 *(footnote)*; *Lawn* v. *U. S.* 355 U. S. 339, 362 *(footnote)*.

(2) *Petitioner's theory is too far reaching and conflicts with West* v. *U. S., 361 U. S. 118.* Obviously in *West* v. *U. S.*, if the ship had been carefully maintained it would not have needed repair. Here petitioner seeks to impose an absolute, continuing obligation on one who may have negligently created a fire on his premises for all persons who may subsequently come on these premises, regardless of their purpose, even though that may be, as was petitioner's, to correct, limit or investigate the very condition resulting in the injury.* Under petitioner's theory, liability would continue until the premises were restored to their original condition.

It may be said at the outset that the great majority of fires are due to negligence. See *Wax* v. *Co-operative Refinery Association*, 1951, 154 Neb. 805, 809, 49 N. W. 2d

*No claim is made here that petitioner was injured as a result of an unusual hazard or one unrelated to his purpose in being aboard the vessel. Stipulated Findings 31-36 (pp. 64a-65a).

707 and *Krauth* v. *Geller*, 1960, 31 N. J. 270, 274, 157 Atl. 2d 129, cited by petitioner. This being so, the theory advocated by petitioner would be tantamount to affording petitioner a warranty against any condition resulting from the fire and would mean that petitioner herein or any fireman acting as a fire watchman could recover if, on making his inspections, he tripped and fell over an item of debris resulting from the fire; contracted pneumonia as a result of getting wet from water in the compartments; lost his balance and fell because of the ship's having taken a list; was overcome by smoke poisoning in an interior compartment of the vessel or was struck when some weakened or burned through appliance on the ship should fall. Beyond this, the same rule would logically apply to any shipyard worker engaged to repair the vessel and injured as a result of any sequelae of the fire.

The scholarly review of the policy* considerations herein by the learned Chief Justice of New Jersey (dismissed as a "horse and buggy concept" by petitioner) in *Krauth* v. *Geller supra*, notes at page 273-274 that a fireman is in an analogous situation to a repairman injured by the condition he is engaged to remedy. That the repairman cannot recover in such a situation has been seen in the case of *West* v. *U. S.*, 361 U. S. 118, 123.** If the shipowner be not liable to a repairman whom he has the power to exclude from the vessel, *a fortiori* the shipowner should not be liable to a fireman whom he cannot exclude from the vessel. As Judge Ryan found, p. 50a:

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*Elements of fairness and balance enter into these considerations. As this Court said in *Dalehite* v. *United States*, 346 U. S. 15, 43.

> "It (Federal Tort Claims Act) did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights."

**The shipowner was found "under no duty to protect petitioner from risks that were inherent in the carrying out of the contract". Nor was petitioner here unaware of the danger of explosive gas. See stipulated Finding 23, 63a and opinion Ryan C. J. 51a.

"Respondent had no power to prevent McDaniel as a representative of the fire department, from entering the area where the explosion occurred."

(3) *The explosion, the proximate cause of injury, was not caused by respondent's negligence and was not foreseeable when the fire started.* Any chain of foreseeability or proximate causation from the original fire was broken by three intervening circumstances. These are glossed over in the petition. Their existence is further evidence of why petitioner abandoned in the lower courts the theory of liability based on the original causation of the fire.

(a) Petitioner was not injured in the original fire but by a flash explosion, which did not just happen, but was triggered by an igniting agent not shown to be caused by any negligence of respondent.

In the District Court and in the Court of Appeals petitioner assiduously pursued the point that the igniting agent of the explosion, the proximate cause of the accident, was due to respondent's negligence. He failed to establish this in either Court (opinion—Ryan C. J., 46a), (opinion—Court of Appeals, petitioner's appendix, 10a). Petitioner has now discarded this claim here so as to enable him to resort to a remote cause not discussed below.

(b) The explosion took place 9½ hours after the fire was considered extinguished by the Fire Department (Stipulated Finding 7, p. 57a), (opinion—Ryan C. J. pp. 45a-47a).

(c) The explosion occurred at a time and at a place on the vessel under the control of the Fire Department and, indeed, petitioner himself* (opinion—Ryan C. J. p. 46a). No officers or crew members were present. (Stipulated Finding 30, p. 64a.)

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*"McDaniel at the time of the explosion was in charge of the investigation of the area in question."

Respondent submits that the answer to petitioner's argument that "but for" the fire there would have been no gas condition and ultimate explosion is that "but for" the ignition of the gas at a time when petitioner was in charge of investigating these conditions and when none of respondent's personnel were present, there would have been no explosion and no injury to petitioner.

Further, respondent submits that the flash explosion occurring at 5:30 p.m. the ensuing afternoon could not have been reasonably foreseeable to respondent when the fire started at 12:45 a. m. since it was not foreseeable to the Fire Department who believed the fire extinguished at 8 a. m. Thus Chief Judge Ryan was quite correct when, apart from policy considerations as to firemen, he said (p. 47a):

> "Since the fire was considered extinguished at 8 A. M. *liability must be founded on some other act or acts of negligence after that time* and indeed it is under this theory that libelant presents his case." (Emphasis supplied)

This finding by the District Court was unchallenged in the Court of Appeals. It should not be deemed clearly erroneous here.

POINT II

PETITIONER DID NOT RAISE BELOW THE ISSUE OF SAFETY REGULATION VIOLATIONS; NOR DID HE EVER PROVE EITHER SUCH VIOLATIONS OR ANY CAUSAL CONNECTION THEREFROM.

Petitioner claims that respondent violated certain safety regulations and that if respondent be not liable for negligence in creating the fire that it is liable by reason of the violation of such safety regulations

The clear answers to this argument are similar to the answers to petitioner's first argument:

1. *The issue was not raised below.* This issue was not raised at all in the Court below and should not be heard here.

2. *No violation was ever shown as to the fire.* That not only have none of the four Courts below ever found any violation of a safety statute, ordinance or regulation but, quite to the contrary, the first District Court, the only Court where this issue was seriously pressed, held in its Conclusions of Law numbers 3 and 4 (67a), that an alarm was turned in promptly, the fire department responded promptly, (Finding 7, p. 57a) took charge and that the activities of the vessel's crew at the time were not unreasonable or negligent as to the handling of the fire.

How specious this entire argument as to claimed violations is, is indicated by the reference to failure to have fog nozzles aboard the vessel. As petitioner admits on page 14, when the fire broke out, the engine room pumps were rendered immediately inoperative and therefore, there was no water pressure. Thus, no matter what type of nozzles might have existed, without water pressure, they would be unserviceable.

Again petitioner belatedly refers, for the first time since the first trial, to a failure to have an auxiliary fire fighting system aboard the vessel (now specified by the International Convention for Safety of Life at Sea 1948). However, according to Conclusion of Law No. 5 (67a-68a), the first District Court found that the petitioner conceded that the Convention did not apply to fire-fighting equipment on Norwegian vessels until November 19, 1954, or nine months after the event.

Petitioner has not shown that respondent, owner of a Norwegian flag vessel (Stipulated Finding 2, 55a) has

(a) failed to comply with any Norwegian regulations existing in February 1954 (b) that it was otherwise subject to different regulations by any other power, and particularly, (c) that it was subject to any of the regulations noted in his appendix. Further, it should not be assumed that the maritime nation of Norway was not as advanced in safety precautions in 1954 as any of the other leading maritime nations of the world.

3. *No violation was ever shown as to the explosion.* It must not be lost sight of that petitioner was injured, not in the fire itself, but in the flash explosion occurring 17 hours after the fire commenced, and 9½ hours after it was considered extinguished by the Fire Department. There has been no showing of violation of any statute, regulation or ordinance with respect to the area of the explosion, or the post fire conduct of ship's personnel.

Respondent therefore contends that the charges in Point 2 are as meritless today, after being raised in this Court without being raised in the Court below, as they were when rejected by Judge Edelstein at the first trial in 1957. The facts herein simply will not accommodate themselves to petitioner's theory of recovery.

POINT III

THE CONCURRENT FINDINGS OF THE DISTRICT COURT AND THE COURT OF APPEALS SHOULD BE UPHELD.

In his Point 3 petitioner does no more than quarrel with the second District Court's evaluation of the evidence and the inferences drawn therefrom with respect to claimed notice of a dangerous condition.

In answer to this respondent need only point to the stipulated Findings of Fact 8, 9 (as modified pp. 11a-12a)

10 through 17, and 30 through 36 (57a-65a). These and the opinion of Chief Judge Ryan especially (48a and 49a) as reviewed by the Court of Appeals (8a-9a petitioner's appendix), show clearly that no one, whether Panama Canal Company employees, Fire Department members or ship's personnel had any actual or constructive notice* of any dangerous condition until sometime after 4:30 P. M. or probably around 5 P. M. (p. 50a) on the day of the accident. At the very least the concurrent evaluation of the stipulated findings and inferences drawn therefrom by two courts below should not be deemed clearly erroneous. *Graver Tank and Mfg. Co. v. Linde Air Products*, 336 U. S. 271, 275.

POINT IV

PETITIONER, A PROFESSIONAL FIREMAN, IS NOT ENTITLED TO THE WARRANTY OF SEAWORTHINESS.

In reply to petitioner's point 4 that he is entitled to the warranty of seaworthiness, respondent relies on the views of the Court of Appeals for the Second Circuit (7a-8a of petitioner's appendix) and also the views expressed by the Second District Court through Chief Judge Ryan (47a).

Petitioner asks this Court to clarify the uncertainty on the issue of "reliance upon a warranty". Respondent was of the opinion that this had been done in *West v. United States*, 361 U. S. 118, 121-122, where this Court noted that seamen and others engaged in loading and unloading vessels "*depended* upon the seaworthiness of the ships, their equipment and gear." (Emphasis supplied.) This Court therefore pointed out it was "only fair" that the shipowner be subjected to the warranty as to them.

*Carbon monoxide, the gas that was ignited is odorless and colorless (Finding 34, p. 65a).

With respect to vessels undergoing major repairs or, as here, having suffered major damage and obviously unseaworthy.

> "It would be an unfair contradiction to say that the owner held the vessel out as seaworthy in such a case" *supra* p. 122.

Whether or not petitioner was doing any work traditionally done by seamen is a question of fact, and the trier of the facts at the second trial answered that question in the negative (page 47a):

> "It cannot be said that McDaniel was doing any work traditionally done by seamen, therefore the warranty is not available to him."

A short answer to petitioner's claim that he was doing the work of a seaman can be seen from an analysis of his duties and authority as stated by Judge Ryan (p. 46a) first generally:

> "In this case, McDaniel as a fire watchman, was aboard the ship on the orders of his superiors for the purpose of public safety and regardless of the wishes of the owner of the vessel."

and then specifically, p. 50a:

> "Respondent had no power to prevent McDaniel, as a representative of the fire department, from entering the area where the explosion occurred."

and also p. 46a:

> "His authority as to the fire aspects of this area, and that included the threat of explosive gas fumes, superseded even than (sic) of the ship's officers."

It is difficult to conceive of any comparable ship's officer or crew member with such authority or control vested in him that the owner of the ship could not object to his board-

ing the vessel or entering an area of danger or which would place him outside the purview of discipline of the ship's officers.

Further illustrative of the differences between petitioner and the usual recipient of the warranty under the *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 line of cases is this Court's decision in *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52. This case, like that of *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 52, provided the underlying philosophy of what was to follow when *Sieracki* extended the warranty to longshoremen. In *Imbrovek* this Court pointed out at page 62 that, formerly the work was done by the ship's crew, but a specialized service had developed, upon a class "as clearly identified with maritime affairs as are the mariners."

It would, indeed, be stretching the point to say that firemen in petitioner's status belong to a class "as clearly identified with maritime affairs as are the mariners."

CONCLUSION

THE PETITION SHOULD BE DENIED.

Respectfully Submitted

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JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1960

No. 593

JAMES E. McDANIEL,

Petitioner,

against

M/S LISHOLT, her engines, etc. and A. S. LISE, her owner,

Respondents.

REPLY BRIEF FOR PETITIONER

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JAMES E. McDANIEL,

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against

M S LISHOLT, her engines, etc. and A. S. LISA, her owner,

Respondents.

REPLY BRIEF FOR PETITIONER

Respondents would avoid adjudication of the principal question tendered by petitioner, *i.e.*, the continuing liability of a shipowner, who negligently starts a fire, to the professional fireman who later is proximately injured while performing a firewatch. Several of respondents' arguments are patently meretricious. Others, unwittingly, underscore the fundamental importance of the underlying issues both with respect to the development of the general maritime law and the concomitant opportunity to restate controlling principles of general tort liability.

1. Petitioner's status as a fireman should be of "special interest to this Court", if for no other reason, because of the frequency of shipboard fires at sea and in port.

We had assumed that the "Court's function in declaring the general maritime law, free from inappropriate common-law concepts" [1] was not conditioned upon the numerical

[1] *Kermarec v. Compagnie Generale Transatlantique*, 1959, 358 U. S. 625, 630, 79 S. Ct. 406, 409, 3 L. Ed. 2d 550.

incidence of the common law rule upon maritime torts. But if statistical proof of the large number of shipboard fires and explosions at sea and in port is necessary, such proof is available.[2] The reported frequency of such disasters necessarily involving the services of firemen and many other public and private shoreside personnel aboard vessels (doctors, rescuers, clergy, policemen, inspectors, etc.) would alone justify the judgment of this Court as to the validity of the common law rule here challenged.

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[2] The United States Coast Guard in its monthly publication "Proceedings of the Merchant Marine Council", reports the annual number of shipboard fires and explosions at sea and in port as follows:

1953—195, Vol. 14, No. 4, April 1957, p. 59
1954—254, Vol. 14, No. 4, April 1957, p. 60
1955—251, Vol. 14, No. 4, April 1957, p. 61
1956—272, Vol. 14, No. 4, April 1957, p. 62
1957—249, Vol. 14, No. 10, Oct. 1957, p. 170
1958—308, Vol. 16, No. 1, Jan. 1959, p. 19
1959—218, Vol. 16, No. 11, Nov. 1959, p. 224
1960—201, Vol. 17, No. 10, Oct. 1960, p. 180

It has reported 52 fires and explosions on vessels in port during the fiscal years 1959 and 1960. See Appendix.

Statistics for the United Kingdom disclose shipboard fires in port as follows: 1946—248; 1947—287; 1948—302; Reanney, E. W. "Fire Prevention and Fire Fighting in Ships in Port", *Fire Fighting on Ships*, pp. 137-139, 3rd Ed. Glasgow. Brown Sons & Ltd. (Lib. Cong. "V.K. 1258"). The Liverpool Underwriters' Association reports 427 fires and explosions in 1960. New York Times, February 8, 1961, p. 63.

The recent fire on the aircraft carrier *Constellation*, at the Brooklyn Navy Yard (Dec. 1960); the burning of the S.S. *Normandie* in N. Y. harbor (Feb. 1942), and the fire-explosion aboard the S.S. *Grandcamp* in Texas City harbor (Apr. 1947), are dramatic reminders of the large scale involvement of city firemen when shipboard fires occur.

2. *Kermarec* did not determine the exclusive "rights and status" of petitioner as an "incidental" shipboard visitor, nor did the prior remand of this case for a new trial "in light of *Kermarec*" imply an endorsement of the common law rule exempting the negligent shipowner.

From the very inception of this case, petitioner has sought to establish respondents' liability on two alternate theories of negligence: a) the breach of duty to the injured professional fireman solely because of the *original* negligence of the shipowner in starting the fire, without regard to respondents' conduct thereafter; b) the breach of duty to petitioner as a person lawfully on the vessel, because of respondents' conduct *subsequent* to the outbreak of the fire, without regard to the cause of the fire.

Since the judgment upon the first trial and the first affirmance by the Court of Appeals were based in part upon the erroneous finding that petitioner was a "licensee", we may reasonably assume that the remand by this Court for a new trial in "light of *Kermarec*" was solely to correct that error. We may further assume that this Court never reached the question of the applicability of the common law rule to a maritime tort, because there was no need to do so, other reversible error having been found. If, upon the second trial, the Court had found that respondents failed to exercise reasonable care for the protection of the petitioner as a lawful visitor, petitioner could have prevailed without any necessary determination of the alternate theory.[3]

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[3] These observation would ordinarily have been deemed gratuitous, but for the following argument on pages 8-9 of Respondents' Brief: "At the second trial it was respondent's position that if it owed petitioner a duty to refrain from negligently starting fires on its vessels then there was no need for this Court to remand for a new trial in the light of *Kermarec* but merely for an assessment of damages."

3. Rejection of the common law rule would not impose "a continuing absolute liability to firemen for any original negligent creation of the fire". It would not result in doctrine "too far reaching" nor would it "conflict with the spirit of *West* v. *United States*, 361 U. S. 118."

The rule sought would not result in a policy of "absolute" liability. Proof of the occupier's negligence in causing the fire would still be a necessary pre-condition to liability. Similarly with respect to the alleged unfairness of a policy of "continuing liability". The concept of "continuing" future exposure because of a past negligent act is not unknown in the law, nor is it as horrendous a principle as respondents would have it appear. In fact, this is the precise situation whenever liability is imposed for passive negligence, e. g., the creation of a dangerous condition which may continue indefinitely before it results in injury. It is also implicit in determining the justiciable limits of foreseeability, proximate cause and consequential damages. Moreover, if the common law rule is rejected, there would still remain, as in any ordinary negligence case, the issues of proximate cause and contributory negligence.

There is no legal impediment to the rule urged by the petitioner that the shipowner who negligently starts a fire should be liable to the professional fireman who is injured while performing his duties. No new theory of tort liability is thereby created. "* * * if recovery is to be denied to the firemen in all cases, it must be on some basis other than the absence of probable harm, proximate cause, or the other elements of an ordinary negligence action".[4] Respondents' liability would conform with established principle. The respondents' fault in starting the fire created a risk "reasonably to be perceived" of injury to the petitioner, a professional fireman, whose presence on the burned vessel

[4] Harper & James, *Law of Torts* (1956 Ed.), Vol. 2, p. 1503.

was "within the range of apprehension".[5] If respondents are to be granted immunity it must be because of "expediency",[6] or overriding consideration of public policy. Such accommodation is no longer acceptable to the extent that it may have "originated under a legal system in which status depended almost entirely upon the nature of the individual's estate with respect to real property * * * ".[7] It cannot be defended because it "derived from a public policy, designed to give maximum freedom to infant industrial enterprises * * * ".[8] It cannot be justified under the discredited defense of "assumption of risk", a laissez faire concept "which has passed its prime * * * likely to lose more ground as notions of social insurance gain strength and techniques for affecting broad distribution of enterprise liability are developed".[9] Logic is defied when the occupier must account to the innocent pedestrian or adjoining landowner who are damaged by the sequelae of a negligently caused fire, but need not account to the fireman or policeman injured putting out the fire to protect the same pedestrian or adjoining landowner. Logic is defied when the negligent occupier must account to the injured rescuer who voluntarily enters a burning building, but need not account to a similarly injured fireman or policeman unless fortuitously there is proof that a safety regulation has been violated. If "moral coercion" in the face of danger be the touchstone of duty to the accidentally present voluntary rescuer, should it be

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[5] *Palsgraf* v. *Long Island R. Co.*, 1928, 248 N. Y. 339, 344, 162 N. E. 99, 100.

[6] *Palsgraf, supra*, p. 354.

[7] *Kermarec, supra*, p. 631.

[8] *Kernan* v. *American Dredging Company*, 1958, 355 U. S. 426, 431, 78 S. Ct. 394, 397, 2 L. Ed. 2d 412.

[9] Harper & James, supra, Vol. 2, pp. 1174-1175. In admiralty, conduct formerly labeled "assumption of risk" is now treated as contributory negligence to be considered only in mitigation of damages. *Socony-Vacuum Oil Co.* v. *Smith*, 1939, 305 U. S. 424, 59 S. Ct. 262, 83 L. Ed. 265; *Palermo* v. *Luckenbach Steamship Company, Inc.*, 1957, 355 U. S. 20, 78 S. Ct. 1, 2 L. Ed. 2d 3.

any the less in the case of the socially necessary constant volunteer, the professional fireman or policeman?[10] Peti-

[10] The illogic and confusion which result from an artificial distinction between a civilian rescuer and a professional fireman is illustrated in the New Jersey cases. In *Krauth* v. *Geller*, 1960, 31 N. J. 270, 157 Atl. 2nd 129, the injured fireman could not base his claim upon the original negligence in starting the fire because of his status as a professional firefighter. Although decided as a matter of policy, the Court left open the possibility of a contrary conclusion if the evidence of negligence was extreme or "wanton". On the other hand, in *Capone* v. *Spiniello Construction Co.*, 1956, 42 N. J. Super. 590, 127 Atl. 2d 441, the Court permitted professional firemen to recover when, as members of the fire department's rescue squad, they suffered gas poisoning while rescuing defendant's employees who were asphyxiated in the course of their work. The Court held that the defendant was negligent in creating the gaseous condition and that a wrong to those working with a pump capable of producing the deadly gas was also a wrong to rescuers under the doctrine of *Wagner* v. *International Ry. Co.*, 1921, 232 N. Y. 176, 133 N. E. 437. See also *Hallett* v. *Stanley Stores*, 1st Dept. 1950, 276 App. Div. 386, 94 N. Y. S. 2d 622, aff'd 301 N. Y. 698, 95 N. E. 2d 52 (policeman injured removing precariously hanging advertising sign) and *Rushton* v. *Howle*, 1949, 79 Ga. App. 360, 53 S. E. 2d 768 (policeman injured trying to stop runaway auto where recovery was allowed notwithstanding plaintiffs were public officers injured in the performance of their duties).

The English cases hold similarly. Thus, in the leading case of *Haynes* v. *Harwood*, 1935, 1 K.B. 146 a police constable, injured while on duty when he sought to stop runaway horses, was allowed to recover from the defendant whose servant had negligently left the horses unattended. In *Merrington* v. *Ironbridge Metal Works, Ltd.*, 1952, A.E.L.R. 1101, 1103-1104, the rule was applied to a fireman injured by an explosion resulting from a negligently created fire. The Court, limiting its decision to the facts before it, noted that assumption of risk should be rarely, if ever, imputed to one acting under the compulsion of a duty. In *The Gusty and The Daniel M.* 1940, L.R. Pro. Div. 159, the rule that the trained or duty bound rescuer does not assume the risk was applied in admiralty. There the *Daphne* sustained damages while performing a statutory duty to render assistance to the *Gusty* and the *Daniel M.* which had collided on the Thames River. The Court held the *Daniel M* liable to the *Daphne* for the former's negligence in causing the original collision.

tioner submits that there are, in fact, no inhibitions of public policy to justify the perpetuation of the common law rule. The negligent occupier should be responsible to all persons, including firemen, for the reasonably foreseeable consequences of the fire. His duty should not be limited, as the courts below have held, solely to non-negligent conduct toward the fireman after he arrives upon the premises. A needless and discriminatory disability upon a class of persons most likely to suffer as a result of the occupier's negligence would thus be eliminated.[11] With it would also disappear the decisional confusion which respondents concede now exists (Resp. Br. p. 5). The correction of such a situation is the responsibility of this Court because of its unique prerogative to declare and foster a uniform general maritime law.

Nothing in *West* v. *U. S.*, its decision or its "spirit", lends comfort to respondents' defense of the common law rule. In *West* there was no finding of original negligence which occasioned the subsequent injury or made it foreseeable. In *West* it was the "work of repair" which created the danger. Here the danger resulted from the original fire. It was the fire which generated the gases in the freeze-box, not the act of any subsequent visitor aboard the vessel. If anything, the accumulating gases were the "'hidden or inherent defects, sometimes called 'latent', that would make the owner guilty of negligence, even though he had no control of the repairs".[12] Unlike *West* the respondent in the case at bar had not divested itself of control. It had hired longshoremen, and its employees participated in and super-

[11] It is discriminatory to deny the petitioner the benefits of the "rescue doctrine". When he returned the second time to the freeze box, he was already suspicious of the escaping gases. He could have continued on his way to make his report to headquarters and thereby escaped the explosion. His return, with the chemist, can be explained only in terms of "moral coercion" to make doubly sure that the longshoremen and the vessel were not, in fact, imperiled.

[12] *West* v. *United States*, 1959, 361 U. S. 118, 124, 80 S. Ct. 189, 193, 4 L. Ed. 2d 161.

vised the removal of perishable stores from the freeze box area, for the shipowner's benefit. It was in this area that the explosion occurred. Assuming *arguendo* that the orbit of duty would not extend to one boarding the vessel to repair fire damage, a similar immunity would not apply to the fireman boarding the vessel to fight the fire and to ensure its complete and final extinction.

4. The fire was the proximate cause of the explosion.

If there be merit in petitioner's analysis, it would follow that the shipowner who negligently caused a fire should be responsible to the injured fireman whether the injury results from explosion, smoke poisoning, pneumonia, slipping on a listing deck, tripping over or being struck by falling debris. It is "not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye." [13]

Nor is the time factor between cause and effect material provided they are proximate. Respondents' attempt to insulate the explosion from the fire by an hour-count or by search for an intervening trigger mechanism must fail in the face of the record and established principle. There is no dispute between the parties that the explosion was the end product of a continuing unfolding of physical forces initiated by the fire. "It is found as a fact and conceded by both sides that what caused the insulation in the freeze box to smolder was the heat radiating through the steel plates from the engine room fire below".[14] "* * * the cork insulation in the interior of the wall of the freeze box had been smoldering progressively since the fire".[15] "* * * the gas

[13] *Palsgraf, supra*, p. 344.
[14] Finding 35, 65a.
[15] Finding 32, 64a.

released from the incomplete combustion of the cork insulation was creating an explosive atmosphere consisting of carbon monoxide and other unknown gases".[16] There, therefore, was no break in the chain of causation between the fire and the explosion.[17] Nor does the absence of a finding regarding the specific igniting agent of the explosion affect the chain of causation. None of the several theories as to what triggered the explosion, even if proven, would have been an "intermediate cause disconnected from the primary fault, and self operating, which produced the injury".[18] Respondents cannot now be heard to say that when they negligently created the fire, they did not have "in mind the particular means by which the potential force they had created might be vitalized into injury."[19]

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[16] Finding 33, 64a-65a.

[17] *Insurance Company* v. *Tweed*, 1868, 74 U. S. (7 Wall) 44, 52, 19 L. Ed. 65, 67 (fire and explosion proximately related where negligently caused fire in one building, spreading to another, caused fire and explosion in third).

[18] *Milwaukee Ry. Co.* v. *Kellogg*, 1877, 94 U. S. 469, 475, 24 L. Ed. 256, 259 (spreading fire); *The Santa Rita*, 9 Cir. 1910, 176 F. 890 (negligent discharge of ship oil into bay held proximate cause of fire damage to wharf and moored vessel. As in the case at bar, the accidental undetermined ignition of oil by third persons—smoking, etc.—found not efficient intervening cause to break chain of causation).

[19] *Johnson* v. *Kosmos Portland Cement Co.*, 6 Cir. 1933, 64 F. 2d 193, 196 (lightning ignited gases allowed negligently to remain in oil barge).

"The forseeability of an unreasonable risk of harm and not the proximity in space or time or the number of intervening events becomes the focal point of liability. *Wagner* and *Buick* combine to demolish the notion that proximate cause requires a smoothly running undiverted stream of events." Lambert, Anatomy of Rescue Doctrine, 5 The Plaintiff's Advocate, No. 1, p 11, January 1961.

5. The applicability of the common law rule to a maritime tort, and petitioner's contention that his case, in any event, comes within a recognized exception to the rule, are issues which were raised below; they have never been abandoned and are now properly before this Court.

(a) Respondents concede that both issues were raised and rejected at the first trial (Resp. Br., pp. 8-9, 14; Findings 3, 56a; Conclusions of Law 2, 3, 4 and 5, 66a-68a, 155 F. Supp. 619, 620, 625). In their respective briefs to the Court of Appeals upon the first appeal, both issues were again raised and petitioner specifically called attention to violation of Rule 45 of the Panama Canal Zone Regulations.[20] With all the facts before it, the Court found no breach of duty because petitioner was a "licensee" and as a fireman he had "assumed the ordinary risks of his calling," 257 F. 2d 538, 540-541. In its brief to this Court, in opposition to the first petition for certiorari, the respondents vigorously defended the common law rule on grounds of public policy and because a fireman was a licensee (p. 11).

(b) The applicability of the common law rule was again raised upon the second trial. It was briefed in the trial and post-trial memoranda and was reaffirmed by Chief Judge Ryan in his opinion, 180 F. Supp. 24, 26. Respondents, in fact, concede the point when they say "*At the second trial*, it was respondent's position that if it owed petitioner a duty to refrain from negligently starting fires on its vessel then there was no need for this Court to remand for a new trial in the light of *Kermarec* but merely for an assessment of damages" (Resp. Br., pp. 8-9).

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[20] It is significant that respondents studiously avoid joining issue with petitioner's contention (Pet. Br., pp. 13-14) that respondents' violation of Canal Zone Regulations 8.35 and 45 would establish their liability under a recognized exception to the common law rule (Resp. Br., pp. 14-15).

(c) On the second appeal to the Court of Appeals, the applicability of the common law rule to a maritime tort was before the Court in the decision of Chief Judge Ryan. If the Court was silent, it was solely because it adhered to its original determination upon the first appeal. In view of the limited remand from this Court to retry the case "in light of *Kermarec*," it was understandable that both parties and the courts below would address themselves particularly to the issue of respondents' *subsequent* negligence if petitioner was not a licensee.[7] Under these circumstances, to fragment the two trials and the two appeals, as the respondents now urge, and to find abandonment by petitioner of two key issues raised by him from the very inception of the litigation, would be manifestly unfair.[21] Be there any merit to respondents' argument, petitioner respectfully invokes the discretionary power of this Court to prevent a plain miscarriage of justice.[22]

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[21] None of the cases cited by respondents (p. 10) involve a situation where the issue was presented to the District Court; that court ruled on the issue; the trial record contained all the necessary evidence for determining the issue and the issue was thereafter tendered in the petition for certiorari. In the cited cases, the record was devoid of any evidence relevant to the issue; there had been no objection to claimed error committed at the trial, or, the issue had never been raised in the petition for certiorari.

[22] *Hormel* v. *Helvering*: 1941, 312 U. S. 552, 557, 61 S. Ct. 719, 721, 85 L. Ed. 336. The traditional reluctance of lower courts, particularly in admiralty, to change existing law until initial adjudication by this Court is a further reason for granting certiorari here. In *Kermarec*, petitioner never sought to change the common law until it petitioned for certiorari. That issue had never been raised below by any of the parties and was suggested only inferentially by Chief Judge Clark in his dissenting opinion.

6. The single key finding that respondents owed no duty to petitioner until 4:30 p. m. is "clearly erroneous."

Petitioner is aware of the burden upon him to persuade this Court by "a very obvious and exceptional showing of error"[23] that a concurrent finding of fact by two courts below was "clearly erroneous."

It is nevertheless submitted that petitioner's analysis of the facts in his main brief (pp. 3-8, 14-17) satisfies this burden without need for undue probing of the record.

We again call attention to Findings 12 (59a-60a), 11 (59a) and the Chief Steward's testimony (38-39) to emphasize (1) Kinsman's concern and inept inquiry about the gas as early as 11:30 a. m.; (2) Higgett's presence, knowledge of the gas and his failure to alert the Fire Department or the Chief Engineer; (3) the failure of the Chief Engineer or any other ship's officer to inspect the freeze box area at any time between the fire and explosion, and (4) the Chief Steward's uncontradicted testimony that from 3 p. m. on, while supervising the removal of the stores, he and the Canal Company employees "were talking about smelling gas in the store room." Notwithstanding the repeated Findings (9, 10, 12, 20, 23 and 24) that there was an odor of gas, the Chief Steward failed to take any action because he, too, "knew that the refrigerant was harmless freon gas" (Findings 9, 11a).

Upon these indisputable and quickly verifiable facts, to exonerate the respondents because its officers and ship's representatives lulled themselves "into a false security" would appear a patent injustice.

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[23] *Graver Tank and Mfg. Co. v. Linde Air Products Co.*, 1949, 336 U. S. 271, 275, 69 S. Ct. 535, 538, 93 L. Ed. 672.

7. Petitioner was erroneously denied the benefit of the doctrine of unseaworthiness.

Respondents' argument that the doctrine is inapplicable to a professional fireman was anticipated. Petitioner has stated the problem and can add nothing to it, except note that certiorari has since been granted in *Roper* v. *U. S.* (#546, January 23, 1961).

CONCLUSION

The Petition Should Be Granted.

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APPENDIX

Fires and Explosions on Vessels in Port*

Fiscal Years 1959 and 1960

Date of Casualty	Type	Gross Tonnage	Location	Estimated Damage	Casualty and Cause
7-6-58	Tank Barge	666	Memphis, Tenn.	$ 50,000	Explo—ignition of vapors by racing cargo pump.
7-23-58	Tank Barge	30	Dutch Harbor, Alaska	38,000	Explo-fire—gasoline vapors ignited while loading cargo thru hose.
7-3-58	Tank Ship	12,842	Port Tampa, Fla.	130,000	Explo-fire—hose burst due to defect while discharging cargo.
12-16-58	Tank Barge	1,009	Pasco, Wash.	100,000	Explo-fire—exploded while discharging cargo from unknown source.
10-23-58	Tank Barge	545	Slidell, La.	20,000	Vapor Explo-fire—gas vapor ignited while repairs were underway.
11-18-58	Tank Ship	1,664	Perth Amboy, N. J.	—	Vapor Explo—gas vapors ignited by welder's torch.
10-1-58	Tank Barge	452	Jacksonville, Fla.	50,000	Explo—burning torch ignited gas vapors.

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* Data compiled by C. H. Broach, Captain, U. S. Coast Guard, Chief, Merchant Vessel Inspection Division, forwarded by letter dated February 7, 1961.

7-14-58	Tank Barge	593	Grand Lake, Ark.	60,000	Explo—cargo hose connection caused gasoline to spray on exhaust pipe.
5-23-59	Freight	7,771	Seattle, Wash.	10,000	Boiler Explo—soot accumulation in inaccessible area.
4-24-59	Freight	2,861	New Orleans	230,000	Fire—flareback when relighting a hot boiler.
8-3-58	Pass.	116	Jersey City, N.J.	30,000	Fire—engine room fire from undetermined origin.
8-13-58	Freight	8,338	San Pedro, Calif.	200,000	Fire—burning torch ignited insulation in cargo refrigerator.
7-21-58	Freight	3,209	Algiers, La.	500,000	Fire—repair work ignited cork insulation.
1-12-59	Freight	6,939	Erie, Pa.	92,000	Fire—welder's torch.
11-19-58	Freight	9,202	Phila., Pa.	?	Explo-fire—methane gas exploded when seaman turned electrical switch.
1-27-59	Freight	6,949	Montevideo, Uruguay	250,000	Fire in cargo. Spontaneous combustion.
4-8-59	Freight	7,490	Nagoya, Japan	127,000	Fire in cargo. Spontaneous combustion.
7-12-58	Freight	8,183	Danzig, Poland	8,000	Fire in cargo. Cigarette butt.
9-19-58	Freight	8,175	Yokohama, Japan	35,000	Fire in cargo. Unknown source.
12-27-58	Freight	6,065	Inchon, Korea	—	Fire in cargo. Stevedores smoking in holds.

Date of Casualty	Type	Gross Tonnage	Location	Estimated Damage	Casualty and Cause
2-25-59	Freight	7,051	Baltimore, Md.	2,000	Fire in cargo. Either cigarette or sparks from repair work.
9-7-59	Freight	4,782	Portland, Ore.	2,500	Explo—gases generated from residue of contaminated sic water used as ballast.
11-17-59	Tank Barge	1,901	Harvey, La.	90,000	Explo-fire—burner's torch ignited rust preventative.
4-1-60	Freight	6,579	Cleveland, Ohio	1,500	Fire—sparks from boiler ignited canvas cover.
7-16-59	Freight	6,838	Trenton, Mich.	10,000	Fire—overloaded circuit set fire to wood interior cabin.
12-21-59	Freight	6,393	Buffalo, NY	35,000	Fire—failure of oil regulating device.
2-16-60	Pass.	15,548	San Fran.	10,000	Fire—galley fire—undetermined origin.
1-22-60	Tank Barge	1,323	Groton, Conn.	60,000	Fire—fire from pier spread to barge.
11-16-59	Tank Ship	10,461	Mobile, Ala.	7,000	Fire—Combustible vapors exposed to igniting agent.
11-11-59	Tank Barge	1,901	Port Sulphur, La.	15,000	Fire—welder's torch ignited oil
7-25-59	Tank Ship	10,441	Kansas City	15,000	Fire—spontaneous combustion of flammable material stored in closet.
10-9-59	Tank Ship	10,448	Naples, Italy	3,500	Fire—fuel line on dock burst and ignited from automobile engine

Date of Casualty	Type	Gross Tonnage	Location	Estimated Damage	Casualty and Cause
12-19-59	Freight	2,154	Rochester, N. Y.	10,000	Fire—fire started by smoldering cigarette.
3-7-60	Barge	—	Phila., Pa.	7,500	Fire—live coals and ashes were dumped overboard—oil on water contributed to blaze.
2-11-60	Freight	7,838	Oakland, Calif.	2,000	Fire—galley fire through inattention of cook.
4-26-60	Freight	7,060	New Orleans, La.	5,000	Fire—fire in cargo caused by illegal smokers.
11-20-59	Freight	7,654	San Fran., Calif.	35,000	Fire—caused by shore repair facility burning vent duct.
10-14-59	Tank Barge	532	Warwood, W. Va.	3,500	Fire—faulty gasket caused cargo to be sprayed on hot portions of pump engine.
11-7-59	Tank Ship	12,527	Houston, Texas	2,000,000	Explo-fire—flammable gases on the water ignited and traveled to ship.
1-22-60	Tank Barge	2,529	Portland, Ore.	60,000	Explo—gas vapors were ignited by welding sparks.
6-23-59	Tank Barge	1,777	San Diego, Calif.	1,000	Explo-fire—ignition of petroleum vapors in engine room.
11-16-59	Tank Ship	10,195	Savannah, Ga.	?	Explo-fire—residue of gasoline in pipe line was ignited when bolts were heated by cutting torch.

Date of Casualty	Type	Gross Tonnage	Location	Estimated Damage	Casualty and Cause
5-4-59	Tank Barge	486	Mereaux, La.	8,000	Explo-fire—retaining strap on pipe bend broke and inflammable liquid spilled over barge.
12-27-59	Tank Barge	2,529	Crescent City, Calif.	170,000	Explo-fire—pipe line shut off valve leaked causing gasoline to spill on water.
7-10-59	Freight	6,507	Selby, Calif.	8,500	Cargo fire. Spontaneous combustion due to chemical properties of lead concentrates.
4-11-60	Freight	6,713	Bellingham, Wash.	95,000	Cargo fire. Careless smoking.
6-3-60	Freight	8,004	Portuguese East Africa	?	Fire—Longshoreman using matches for illumination.
2-26-60	Freight	6,108	Pusan Harbor, Korea	100,000	Cargo fire. Undetermined cause.
3-9-60	Freight	7,065	Pusan Harbor, Korea	?	Fire—probability of illegal smoking by longshoremen.
4-15-59	Freight	7,604	Yokohama, Japan	?	Cargo fire. Smoking or striking of match by longshoremen.
9-22-59	Freight	6,692	Bremen, Germany	10,000	Cargo fire. Cigarette dropped by longshoreman.
1-26-60	Freight	6,065	Oakland, Calif.	25,000	Cargo fire. Caused by newsprint cargo coming in contact with bare steam piping.